

## **STATE WATER CONTROL BOARD ENFORCEMENT ACTION**

### **A SPECIAL ORDER BY CONSENT ISSUED TO**

**The City of Lynchburg  
VWP Permit Number 98-0167**

#### **SECTION A: Purpose**

This is a Consent Special Order issued under the authority of Va. Code §§ 10.1-1185 and 62.1-44.15(8a) and (8d), between the State Water Control Board and the City of Lynchburg for the purpose of resolving certain violations of environmental laws and regulations.

#### **SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meanings assigned to them below:

1. “Va. Code” means the Code of Virginia (1950), as amended.
2. “Board” means the State Water Control Board, a permanent citizen board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
3. “Department” or “DEQ” means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.
4. “Director” means the Director of the Department of Environmental Quality.
5. “Order” means this document, also known as a Consent Special Order.
6. “Lynchburg” means the City of Lynchburg, Virginia.

7. “Project” means the Enterprise Drive development of 450 acres north of Laxton Road in Lynchburg, Virginia.
8. “SCRO” means the South Central Regional Office of DEQ, located in Lynchburg, Virginia.
9. “VWPP” means Virginia Water Protection Permit issued pursuant to Va. Code § 62.1-44.15:5 and § 401 of the Clean Water Act, 33 U.S.C. § 1341.
10. “Permit” means VWPP number 98-0167, which became effective on March 16, 1999, and expires on March 16, 2004.
11. “NOV” means Notice of Violation.

### **SECTION C: Findings of Facts and Conclusions of Law**

1. The City of Lynchburg was issued VWPP 98-0167 for the Project, which authorized the cumulative impacts to State waters of 1.26 acres of wetlands and 2646 linear feet of stream channel. The Permit required mitigation to the impacts of stream restoration on 1 to 1 ratio, the creation of 2.02 acres of wetlands, and the enhancement of .49 acres of wetlands.
2. Based on a review of Department records and site inspections conducted on March 5, March 27, and April 8, 2002, the Department issued NOV number W2002-04-L-0001 on May 23, 2002, to Lynchburg alleging the following violations of Va. Code § 62.1-44.5.A.1, 2, and 3, and the Permit:
  - a. failure to provide written notification 10 days prior to construction in impact areas pursuant to Part I.B.2 of the Permit;
  - b. failure to clearly flag buffer areas pursuant to Part I.B.3 of the Permit;
  - c. failure to install or maintain erosion and sediment control devices pursuant to Part I.B.4 of the Permit;
  - d. failure to remove accumulated sediment and debris from the storm water management pond pursuant to Part I.B.6 of the Permit;
  - e. unpermitted discharge of sediment to non-impact State waters in contravention of Part I.B.12 of the Permit and Va. Code § 62.1-44.5.A.1;

- f. failure to mitigate for the cumulative loss to State waters in accordance with Part I.C of the Permit;
  - g. failure to submit plan and section drawings for DEQ review and approval prior to the construction of each wetland mitigation area pursuant to Part I.C.6 of the Permit;
  - h. failure to submit as-built surveys of wetland mitigation areas for DEQ approval pursuant to Part I.C.7 of the Permit;
  - i. failure to submit hydrologic data, and failure to plant wetland mitigation areas following DEQ approval of hydrologic data pursuant to Part I.C.8 and I.C.9 of the Permit, respectively;
  - j. failure to determine the success, or failure, of wetland mitigation areas, and submitting late and incomplete the Annual Wetland Mitigation Monitoring Report pursuant to Part I.C.10, Part I.D.2, and Part I.E.3 of the Permit, respectively;
  - k. failure to document and demonstrate stream restoration pursuant to Part I.C.11 and Part I.C.12 of the Permit;
  - l. failure to provide in perpetuity protection of “State waters and buffer areas” in conservation covenants and execute the covenants within 180 days of Permit issuance, and failure to notify DEQ within 30 days of recording the covenants pursuant to Part I.C.15 and Part I.E.1 of the Permit, respectively;
  - m. incomplete and late submittal of the Annual Construction Monitoring Reports in contravention of Part I.D.2 and Part I.E.2 of the Permit; and,
  - n. failure to conduct and submit water quality monitoring pursuant to Part I.D.4 and Part I.E.4.
3. Following a meeting on July 15, 2002, between DEQ and Lynchburg, Lynchburg responded to the NOV in writing on October 4, 2002, addressing each alleged violation.
4. The DEQ responded to the October 4, 2002 letter in writing on January 15, 2003, clarifying the alleged violations and requesting additional information from Lynchburg to

ascertain the total current impacts to wetlands, and total wetlands mitigation.

5. Following a site visit of the Project and two meetings held on February 28 and March 5, 2003, the DEQ and Lynchburg agreed on total wetlands loss and creation, and the course of action to bring the Project into compliance.
6. It appears that the total wetlands loss is 1.16 acres, and wetland creation is 1.63 acres; however, wetland creation is pending confirmation of hydrology and planting data.
7. Pursuant to Part II A of the Permit the Department will revoke the Permit for non-compliance and reissue the Permit to reflect the wetlands loss and creation to date, and to achieve adequate wetlands mitigation.

#### **SECTION D: Agreement and Order**

Accordingly, the Board, by virtue of the authority granted in Va. Code §§ 62.1-44.15(8a) and (8d), orders Lynchburg to perform the actions described in Appendix A of this Order. In addition, the Board orders, and Lynchburg consents, to pay a civil charge of \$17,000.00 within 30 days of the effective date of the Order. The Payment shall note that it is being made pursuant to this Order, and shall note the Federal Identification number for Lynchburg. The Payment shall be made by check, certified check, money order, or cashier's check payable to the "Treasurer of Virginia" and sent to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 10150  
Richmond, Virginia 23240

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend the Order with the consent of Lynchburg, for good cause shown by Lynchburg, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein. This Order shall not preclude the Board, or the Director, from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law

regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the Facility as may be authorized by law; or (3) taking subsequent action to enforce the terms of this Order. Nothing herein shall affect appropriate enforcement actions by other federal, state, or local regulatory authority, whether or not arising out of the same or similar facts.

3. For purposes of this Order and subsequent actions with respect to this order, Lynchburg admits the jurisdictional allegations contained herein.
4. Lynchburg declares it has received fair and due process under the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, and the State Water Control Law, and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.
6. Failure by Lynchburg to comply with any of the terms of this Order shall constitute a violation of an Order of the Board. Nothing herein shall waive the initiation of additional enforcement actions, or the issuance of additional orders, as appropriate by the Board or the Director as a result of such violations.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Lynchburg shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. Lynchburg must show that such circumstances resulting in noncompliance were beyond its control and not due to a lack of good faith or diligence on its part. Lynchburg shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

- a. the reasons for the delay or noncompliance;
- b. the projected duration of any such delay or noncompliance;
- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition listed above, which Lynchburg intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees, and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Lynchburg. Notwithstanding the foregoing, Lynchburg agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
  - a. Lynchburg petitions the Regional Director to terminate the Order after it has completed all requirements of the Order. The Director's determination that Lynchburg has satisfied all requirements of the Order is a "case decision" within the meaning of the Virginia Administrative Process Act; or
  - b. The Director or the Board may terminate this Order in his or its sole discretion upon 30 days written notice to Lynchburg.

Termination of this Order, or of any obligation imposed in this Order, shall not operate to relieve Lynchburg from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. By its signature below, Lynchburg consents to the issuance of this Order.

And it is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
Robert G. Burnley, Director  
Department of Environmental Quality

The City of Lynchburg consents to the issuance of this Order.

Date: \_\_\_\_\_ By: \_\_\_\_\_  
L. Kimball Payne, III, City Manager

Commonwealth of Virginia  
City/County of \_\_\_\_\_

The foregoing document was signed and acknowledged before me this \_\_\_\_\_ day of  
\_\_\_\_\_ 2003, by L. Kimball Payne, III, City Manager, on behalf of the City of  
Lynchburg.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_.

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## **APPENDIX A**

### **The City of Lynchburg shall:**

1. Maintain compliance with all conditions of VWP Permit No. 98-0167 except Part I.B.10, Part I.D.4.a, Part I.D.4.b, Part I.D.4.c, Part I.D.4.d, and Part I.E.4.
2. Within 60 days from the issuance of this Order, properly complete and submit a Joint Permit Application (“JPA”) for a new individual VWP permit to include the following:
  - a. A detailed site location map.
  - b. JPA Signature Page with original signature.
  - c. Signed Agent Authorization Form (if applicable).
  - d. A detailed description of individual impact areas including exact location, acreage or linear feet, and type (e.g., palustrine forested, palustrine emergent, intermittent stream, or perennial stream) of impacts. In addition, please provide descriptions of the type of impact associated with each impact area (e.g., 8’ x 10’ box culvert, 30” diameter by 125’ long concrete pipe, backflooding, etc.).
  - e. Full-size or half-size plan sheets for the plan. All permit sketches should include, at a minimum, north arrow, scale, original contours, present contours, limit of State waters, impact limits, location and dimension of all structures in impact areas.
  - f. Stormwater maintenance plan.
  - g. Submit appropriate JPA Appendices, including DEQ addendum.
  - h. An aerial photo, scaled map, or delineation report that clearly shows the property boundaries, wetland and stream boundaries, and surface water and wetland impacts.
  - i. Copies of the wetland delineation data sheets.
  - j. Copy of the USACE delineation confirmation.



- k. A complete description of compensation for unavoidable losses (2:1 for wetland impacts and 1:1 for stream impacts).
- l. A conceptual wetlands compensatory mitigation plan that includes, at a minimum, the following:
  - 1. Goals and objectives of the plan, in terms of replacement of functions and values and expressed in acres of each wetland type;
  - 2. Location map, including latitude and longitude (to the nearest second) at the center of the compensation site(s);
  - 3. Source of hydrology and additional ground water data for the proposed compensation site(s);
  - 4. Hydrologic analysis, including a water budget based on expected monthly inputs and outputs which will project water level elevations for a typical year, a dry year, and a wet year;
  - 5. Wetland delineation confirmation and data sheets and maps for existing wetland areas on the proposed site(s);
  - 6. Planting scheme and schedule, including suggested plant species, zonation and acreage of each vegetation type proposed;
  - 7. Soil preparation and amendment plan addressing both topsoil and subsoil conditions;
  - 8. Draft design of water control structures;
  - 9. Proposed monitoring plan, including proposed success criteria, monitoring goals, and the location of photo stations, monitoring wells, soil sampling points (as appropriate), and vegetation sampling points; and
  - 10. An abatement and control plan for undesirable plant species, including, at a minimum, the species listed on the Department of Conservation and Recreation's ("DCR") Invasive Alien Plant Species of Virginia list, and including procedures to notify DEQ of any undesirable plant species occurrences, methods of removal, and successful control; and an erosion and sedimentation control plan.
- m. A conceptual stream compensation plan, which includes, at a minimum, the following:
  - 1. Goals and objectives of the plan, in terms of replacement of functions and values and expressed in linear feet;
  - 2. Stream deficiencies to be addressed;
  - 3. Detailed description of the stream bed and stream bank stabilization activities (e.g., type of vane, root wad, or other in-stream structure, location);
  - 4. Riparian buffer plantings (e.g., scheme, species, width);
  - 5. Plan view and cross-section drawings of stream segments to be restored;

6. Plan view and cross-section drawings of proposed in-stream structures;
  7. Proposed location of vegetative/bank monitoring stations and photo stations;
  8. Proposed schedule for compensation site construction;
  9. Location map, including latitude and longitude (to the nearest second) at the center of the compensation site;
  10. Proposed monitoring plan, including proposed success criteria for streambed and stream bank stabilization and riparian buffer success, monitoring goals which shall include, at a minimum, physical stream measurements and surveys to determine stability of the stream, riparian habitat assessment following scientifically based protocol, and the proposed location of photo stations, vegetation sampling points, survey points, and reference streams (if available); and
  11. Abatement and control plan for undesirable plant species, including, at a minimum, the species listed on DCR's Invasive Alien Plant Species of Virginia list, and including procedures to notify DEQ of any undesirable plant species occurrences, methods of removal, and successful control.
3. Unless otherwise specified in the Order, or the Permit, all correspondence related to the Order shall be sent to:

Harry F. Waggoner  
Virginia Department of Environmental Quality  
7705 Timberlake Road  
Lynchburg, Virginia 24502